BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HAROLD STANLEY ROBINSON Claimant	)	
VS.	)	Docket No. 1,015,669
SOUTHWESTERN BELL TELEPHONE CO. Self-Insured Respondent	)	

ORDER

Respondent requested review of the April 24, 2006, Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on August 8, 2006.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Anton C. Andersen, of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that claimant met with personal injury by accident arising out of and in the course of his employment in a series of injuries, culminating on July 10, 1998. The ALJ concluded that claimant had a functional impairment of 34 percent to the body as a whole. The ALJ also concluded that claimant was entitled to a work disability of 66.5 percent based on a wage loss of 71 percent and a task loss of 62 percent. The ALJ considered P.I.K. Civ. 3d 171.45 and its attached mortality table and concluded that claimant's lump sum retirement benefit of $196,060.46 should be divided by his estimated life expectancy,1,279.2 weeks, making the retirement credit under K.S.A. 44-501(h) $153.27 per week. The ALJ ordered that this retirement credit should commence only after the payment of the 52.29 weeks of temporary total

disability compensation and the 128.42 weeks of permanent partial disability compensation which were based on the percentage of claimant's functional impairment.

Respondent requests review of the ALJ's calculation of the retirement benefits credit offset under K.S.A. 44-501(h) for benefits received by claimant after his retirement from respondent's defined benefits pension plan. Respondent also argues that this credit should have commenced immediately upon claimant's retirement on July 18, 1999, instead of 128.42 weeks later. Respondent also argues that claimant is not entitled to work disability. In the alternative, respondent argues that a post-injury weekly wage of between $520 and $600 should be imputed to claimant rather than the wage the ALJ used, $325. Last, respondent argues that the ALJ should have used April 28, 1998, as claimant's date of accident rather than July 10, 1998, which was the last day claimant worked.

Claimant asserts that there is no duplication of wages by claimant simultaneously drawing his retirement benefits and the workers compensation award. Claimant states that his total preinjury gross average weekly wage was $1,122.55. Under the Award, he receives $366 per week. He also receives the equivalent of $288.37 per week in retirement benefits from his pension plan and approximately $279.07 from Social Security disability. Combining these, he receives a total of $933.44 weekly. Claimant argues that without any credit under K.S.A. 44-501(h), he is not duplicating any wage loss through receipt of this workers compensation award. Claimant requests that the Board modify the Award to eliminate the credit. In the alternative, claimant requests that the Board affirm the ALJ's Award of April 24, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds and concludes that the ALJ's Award should be affirmed in part and modified in part.

Claimant began working for respondent in 1969 as a cable splicing technician. In performing this job, he was required to move manhole covers that weighed from 75 to 100 pounds. The manhole covers would be moved from two to three feet so he could climb down into the manhole and perform his work. While inside the manhole, he would perform very strenuous work lifting and pulling cables from one position to another. He also at times climbed telephone poles. Claimant alleges he suffered personal injury by a series of accidents at work beginning in "1996 & each working day thereafter and 05-02-98 & each working day thereafter."[1] Claimant described sustaining a specific injury sometime in 1996 while moving an apparatus from one manhole to another. He felt pain through his neck down through his right shoulder and into his right hand. He reported the injury to his supervisor, Don Oakley, and made a written report. He did not miss any work or seek any

[1] Form K-WC E-1 Application for Hearing filed March 5, 2004.

treatment after the 1996 event. Between 1996 and 1998, the condition of claimant's neck, shoulder, and hand worsened.

Claimant continued to work for respondent, and then on April 28, 1998, he reinjured himself lifting a manhole cover. He had pains through his right shoulder and right arm, as well as pain radiating down his left shoulder and left arm. He sought medical attention through his supervisor, Don Oakley, and filled out another accident report.

After claimant started having problems that he reported to his supervisor, he continued to work for respondent. His job was not modified to accommodate any restrictions or limitations. Respondent sent claimant to Dr. Tyrone Artz. On July 10, 1998, Dr. Artz took him off work, at which time he went on long-term disability, a benefit from respondent.

The question raised for the Board's review is whether claimant suffered a single traumatic accident on April 28, 1998, or instead sustained a series of accidents from his ongoing work activities. Following creation of the bright line rule in the 1994 *Berry*[2] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[3] the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury, as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[4]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

---

[2] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[3] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[4] *Id.* at Syl. ¶ 3.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl."[5]) A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

The Board concludes that claimant suffered additional aggravation to his upper extremities, shoulders, and neck as he continued to perform the same job. Because claimant continued to perform the same job duties and aggravate his condition, the last day worked rule is applicable.[6]

Claimant had not been released to return to any type of work in 1999 by any of his doctors. Respondent did not offer him any light duty work. Since claimant was unable to do his regular work duties, respondent offered him his retirement package. Claimant last day of work was July 17, 1999, and he retired on July 18, 1999.

In July 1998, claimant had carpal tunnel release surgery performed by Dr. Artz. Following the surgery, he continued to have numbness and pain in his right hand. He returned to Dr. Artz, who ordered an MRI. The MRI showed claimant had C3-4 left disc protrusion and C6-7 spondylosis. Dr. Artz referred claimant to Dr. Troy Trimble, who performed a right C6-7 anterior discectomy and anterior fusion in January 1999. The surgery and subsequent physical therapy offered no relief. Claimant was referred to Dr. Kris Lewonowski by Dr. Trimble. Dr. Lewonowski ordered another MRI and an EMG. The MRI did not reveal any recurrent disc herniation or spinal stenosis. The EMG showed evidence of mild chronic C6 radiculopathy and moderate median neuropathy at the wrist. Claimant was then referred to Dr. Rod Jones, who gave him an epidural steroid injection and placed a dorsal column stimulator in his spine. Neither provided any relief, and the stimulator was removed. Claimant has also had a myelogram and a bone scan. Claimant continues to complain of neck pain, shoulder pain, pain in both arms, and pain and numbness in both hands.

Dr. Pedro Murati, who is board certified in rehabilitation and physical medicine, examined claimant on April 5, 2004, at the request of claimant's attorney. According to Dr.

---

[5] *Supra* note 2 at 229.

[6] *See Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

Murati, claimant's chief complaints were neck pain and pain in both arms. Claimant also had numbness and tingling in both arms.

After examining claimant, Dr. Murati diagnosed claimant with neck pain status post C6-7 anterior discectomy, C6-7 anterior fusion, and left iliac crest bone graft harvest for a tricortical autograft with double crush syndrome. Claimant was also diagnosed with bilateral carpal tunnel syndrome secondary to double crush syndrome. Dr. Murati found that the diagnoses are within a reasonable medical probability a result of claimant's work-related injuries in 1996 and 1998.

Using the AMA *Guides*[7], for claimant's neck, Dr. Murati rated claimant as having a 25 percent whole person impairment using the diagnosis related estimate (DRE) cervical Category IV. For the right carpal tunnel syndrome, he rated claimant as having a 10 percent right upper extremity impairment, which converts to a 6 percent whole person impairment. For the left carpal tunnel syndrome, he rated claimant as having a 10 percent left upper extremity impairment, which converts to a 6 percent whole person impairment. Using the Combined Values Chart, claimant's whole person impairments combine for a 34 percent whole person permanent partial impairment. This percentage of functional impairment is the only rating in evidence and is not disputed by respondent. Accordingly, the Board affirms the ALJ's finding that claimant suffered a 34 percent impairment of function from his work-related injuries.

What is in dispute is claimant's percentage of work disability, which is the average of his wage loss and task loss. In this regard, the only evidence of task loss, in the opinion of a physician, as required by statute, likewise comes from Dr. Murati, using a task list prepared by claimant and Jerry Hardin. Dr. Murati recommended permanent restrictions of no ladders; no crawling; no repetitive grasping and grabbing with the right; no heavy grasping on the right or left; no above shoulder level work; no lifting, carrying, pushing, or pulling above 10 pounds, 10 pounds occasionally, and 5 pounds frequently; no work more than 24 inches from the body with both arms; no use of hooks or knives; no vibratory tools with either hand; only occasional repetitive hand controls on the right; and frequent repetitive hand controls on the left. Dr. Murati did not want him to do any repetitive work with his right hand ever.

Dr. Murati reviewed the task list prepared by Mr. Hardin and opined that of the 22 tasks on the list, claimant is unable to perform 14 for a task loss of 64 percent. He admitted that he did not know how much time claimant spent on each of the job tasks.

Mr. Hardin met with claimant on May 10, 2004, at the request of claimant's attorney. Together they prepared a task performance capacity assessment listing 22 tasks claimant

---

[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

performed in the 15 years before his series of accidents.[8] However, during claimant's testimony, he admitted that he had not performed one of the tasks, maintaining air dryers, in the 15 years before his injuries. This reduces the number of tasks to 21. It also changes Dr. Murati's task loss opinion from 64 percent to 62 percent.

It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[9] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[10]

Mr. Hardin looked at jobs available to claimant in the area where he lived that claimant could perform within his medical restrictions and opined that claimant could still earn from $300 to $350 a week. Mr. Hardin also opined that claimant could possibly be a light or heavy equipment operator or truck driver. He admitted that some operators of light or heavy equipment might make up to $13 to $15 per hour. The Board considers it highly unlikely that claimant could perform such jobs within his restrictions. He also stated that claimant could also do retail sales work. Mr. Hardin did not question claimant about any efforts he had made in finding another job. The ALJ found that claimant retained the ability to earn $325 per week. The Board agrees. The parties have stipulated to a pre-injury gross average weekly wage of $1,122.55. This finding, therefore, computes to a wage loss of 71 percent. When averaged with his 62 percent task loss, the claimant's work disability is 66.5 percent. The ALJ's finding of a 66.5 percent work disability is affirmed.[11]

At the time claimant retired, he was entitled to funds from the pension plan that had been set up and solely funded by respondent. Under that plan, claimant could take payments on a monthly basis or in a lump sum. He elected to take the lump sum, an amount of $196,060.46. If he had taken a monthly benefit, he would have received a lifetime benefit of $1,240.55 per month. The $196,060.46 was rolled over into an IRA account. He takes out funds from the account, which he uses for monthly living expenses. Since 2000, claimant has also been on Social Security disability and receives between $1,100 and $1,200 per month from that. Claimant also has a 401K plan, which both he and respondent put money into. He has not taken any money out of the 401K plan. Since

---

[8] Mr. Hardin's report indicates that he used an accident date of May 2, 1998.

[9] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] However, when the ALJ calculated the permanent partial disability compensation in her Award order, it appears she mistakenly used 71 percent instead of 66.5 percent. The Board will correct this error in its award calculation.

leaving respondent, claimant has not looked for any jobs or gone to Kansas Job Service Center. He lives off his Social Security disability benefits and his retirement account.

Christine Holland is the associate director of benefit litigation and ERISA compliance for respondent. She is in charge of the team that handles the legal and regulatory support from the benefits organization. Respondent has two separate plans, a pension plan and a 401K plan. Respondent fully funds the pension plan. After 30 years of service, employees can retire at any time and be eligible for a full pension. Claimant had over 30 years of service. Ms. Holland confirmed that claimant chose to retire and take his money out of the pension plan in a lump sum; that he rolled over the lump sum into a IRA account; that the amount of the lump sum was $196,060.46; and that claimant could have received a monthly sum of $1,240.55 per month for life had he chosen that option.

Hannah Patterson is the leave benefits consultant for respondent. She testified that claimant's retirement benefit is calculated from a formula which has components that include pension band rates and years of service. An analysis is done every year by respondent according to the number of active employees in the bargained plan that calculates the company's responsibility towards the pension plan. Actuarial assumptions are made based on the participant count. The actuarial evaluation includes the number of participants, the length of service of each participant, whether the participant is vested, the union contract, and the growth of the pension plan with regard to investments. The pension plan is a defined benefit plan, which establishes an accrued benefit. It is not a cash balance account, which is a plan where a certain amount of money is put into the plan and the employee can then take a certain amount of money out. No specific amount of money was contributed to this plan for claimant.

Respondent is entitled to a 100 percent credit for the weekly equivalent of its lump sum retirement payment to claimant based upon claimant's life expectancy. Respondent is not entitled to a credit based upon the payment option that claimant did not select. Respondent will not receive any credit or offset for the 401K plan contributions because respondent failed to prove that the plan is a retirement plan and, moreover, failed to prove the amount it contributed to that plan as compared to the amount claimant contributed. Accordingly, the amount of credit, if any, that respondent should receive cannot be determined from this record. Finally, claimant's argument that respondent is not entitled to any retirement credit because there is no duplication of benefits is an argument that should be presented to the Legislature.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 24, 2006, is modified to find that the retirement benefit credit under K.S.A. 44-501(h) should apply concurrent with the payment of permanent partial disability compensation and begin as soon as the payment of retirement benefits began where the total amount claimant is paid is at least equal to the

dollar amount of his functional permanent partial disability award without any such credit. All other findings and orders of the ALJ are affirmed.

Claimant is entitled to 52.29 weeks of temporary total disability compensation at the rate of $366 per week or $19,138.14, followed by 251.18 weeks of permanent partial disability compensation at the reduced rate $212.73 per week in the amount of $53.433.52 for a 66.5 percent work disability, for a total due and owing of $72,571.66.

As of September 20, 2006, there would be due and owing to the claimant 52.29 weeks of temporary total disability compensation at the rate of $366 per week in the sum of $19,138.14, plus 251.18 weeks of permanent partial disability compensation at the reduced rate of $212.73 per week in the sum of $53,433.52, for a total due and owing of $72,571.66, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of September, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENT

I respectfully disagree with the majority as I do not believe K.S.A. 44-501(h) applies to lump sum payments of retirement benefits or benefits that are rolled over into an Individual Retirement Account (IRA). K.S.A. 44-501(h), the retirement credit statute, reads in part:

> If the employee **is receiving retirement benefits** under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any

> compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee . . . . (Emphasis added.)

First, the wording of K.S.A. 44-501(h) indicates that a retirement benefit credit applies only when a worker "is receiving" retirement benefits. After a lump sum amount has been paid, the worker is no longer "receiving" those benefits. In that respect, the statute is clear and unambiguous. Common English usage should not be ignored in interpreting legislative intent.

> "[W]hen a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction." "When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and courts are not justified in disregarding the unambiguous meaning*. . . ."
>
> When reviewing questions of law, a court may substitute its opinion for that of the administrative agency. Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used. The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.[12]

Second, the money that is rolled over into an IRA is not paid to the injured worker. Instead, the money is paid to a custodian or trustee. Consequently, the worker does not receive those retirement benefits until there is a subsequent disbursement from the IRA account.

Third, should common English usage be disregarded, K.S.A. 44-501(h) provides no guidance how a lump sum payment is to be reduced to a projected weekly equivalent. Should one use the gross amount of a lump sum payment or should one use the net amount after taxes? Should funds that are rolled over into an IRA only be considered when there is a disbursement from that account? Should the projected weekly amount be based upon the annuity that could be purchased with the lump sum amount? Or should the projected weekly amount be based upon an estimated weekly cash flow that could be generated by such lump sum applying some capitalization rate?

---

[12] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 980-81, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996) (alteration in original) (citations omitted).

Moreover, many defined retirement benefit plans provide options regarding whether their scheduled payments are to be paid to a survivor or whether the scheduled payments are required to continue for a specified period regardless of the participant's death. Those options, likewise, affect the amount of the periodic benefit payment. Therefore, should those options be considered in determining a projected weekly equivalent?

In short, the facts now before us illustrate the significant difficulties in converting a lump sum payment to a projected weekly equivalent. Conversely, when retirement benefits from a defined benefit retirement plan are actually being paid on a periodic basis (and actually being received by the worker), it is quite simple to determine the weekly retirement credit under K.S.A. 44-501(h).

K.S.A. 44-501(h) penalizes workers who receive retirement benefits. And as a penalty statute, it should be strictly construed. The legislature did not address the lump sum payment of retirement benefits. And the Board should not try to guess how the legislature would have treated those payments.

_____
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Anton C. Andersen, Attorney for Self-insured Respondent